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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOHN LEWIS WEST, Defendant and Appellant.	A152085 (San Mateo County Super. Ct. No. SC078037)

Defendant John Lewis West appeals from a judgment after a jury trial finding him guilty of possession for sale of cocaine base (Health & Saf. Code, § 11351.5). As explained below, after West's first trial ended in a mistrial, he entered a once in jeopardy plea. A jury then found West did not meet his burden of proving he was once in jeopardy. A different jury later found West guilty of the charged offense.

West now asserts instructional error at his once in jeopardy trial. He also asserts an error in the abstract of judgment. We remand for correction of the abstract of judgment and affirm in all other respects.

BACKGROUND

A. February 2015 Mistrial

On June 20, 2013, the San Mateo District Attorney filed an amended information charging West with possession of cocaine base for sale (Health & Saf. Code, § 11351.5). The amended information also alleged West had sustained prior convictions for possession of narcotics for sale (Health & Saf. Code, § 11351.5), possession of narcotics

for personal use (Health & Saf. Code, § 11350), and reckless driving (Veh. Code, § 2800.2), and had sustained one prison prior (Pen. Code, § 667.5, subd. (b).)

Trial began on September 22, 2014. During in limine proceedings, the prosecution disclosed newly discovered evidence. West's motion to continue the trial was granted.

When trial resumed on February 9, 2015, the People filed a motion in limine to require continuing discovery from the defense of "all statements from its witnesses, whether recorded or not." The court granted the motion but ordered it to apply equally to both parties.

The People called as their first percipient witness Clint Simmont, an East Palo Alto police officer and special agent of the San Mateo County Narcotics Task Force. He testified that on March 8, 2013, he searched West and West's home and confiscated 12.89 grams of cocaine base, a digital scale, unused plastic baggies, two boxes of baking soda, a glass pipe, a cell phone and $271.[1] At the police station, West told Simmont the cocaine and pipe were " 'for personal use,' " and " 'just for partying.' "

Simmont was also qualified as an expert witness on certain issues, including determining whether an individual is under the influence of cocaine base and differentiating between possession of cocaine base for sale and for personal use. On direct examination he opined that West possessed the cocaine base for sale. He offered several reasons for that view. He said he saw no signs that West was either under the influence of cocaine base or a chronic cocaine base user. West's personal hygiene and his neat and orderly home were inconsistent with crack cocaine use. The 12.89 grams of cocaine base had a value of approximately $1,300 and would last a typical user 96 hours of continual use, an excessive amount for personal use. The digital scale showed West was dividing the cocaine base for sale. West's pipe did not appear to have been used and was simply a "pre-planned" "construct[]" used as "cheap insurance" to avoid a possession for sale charge. On cross-examination, Simmont added that West had no

[1] The parties stipulated to the lawfulness of the search.

source of income to account for his lifestyle and that items purchased with an electronic benefit card (EBT) can be traded to pay for crack cocaine.

West called Gregg Ogelsby, a former Daly City police officer, as an expert witness. He testified that one reasonable interpretation of the evidence was that West possessed cocaine with the specific intent to sell, but that it was also reasonable to conclude the opposite: that West did not have a specific intent to sell. Ogelsby acknowledged that "it's concerning to have 12.89 grams, but I don't think that it's, you know, an automatic, this is possessed for the purpose of sales." He did not believe West's appearance, the presence of the scale, the cash recovered, or West's statements necessarily led to the conclusion that West had an intent to sell cocaine.

On February 19, 2015, after the close of evidence but before closing arguments and jury instructions, West moved for a mistrial. He argued the People failed to disclose that Simmont would base his opinion on West's lack of income, the neatness of West's apartment, and West's hygienic appearance. The court discharged the jury and informed counsel it intended to grant a mistrial. On May 22, 2015, following additional briefing as to whether further sanctions were warranted, the court found that any prejudice was resolved by granting the mistrial.

B. Once in Jeopardy Bench Trial

On June 3, 2015, West withdrew his not guilty plea and entered a once in jeopardy plea. (Pen. Code, § 1016.) Citing *Oregon v. Kennedy* (1982) 456 U.S. 667 (*Kennedy*), West asserted he could not be retried because the prosecutor's conduct was intended to provoke West into moving for a mistrial.

On September 9, 2015, the court denied West's request for a jury trial of his once in jeopardy claim. Following a two-day bench trial, the court found that West did not meet his burden of proving the prosecutor intended to goad a mistrial and therefore no jeopardy attached.

C. Once in Jeopardy Jury Trial

On October 15, 2015, the Fifth District Court of Appeal filed its decision in *People v. Bell* (2015) 241 Cal.App.4th 315, holding that issues of material fact arising

upon a plea of once in jeopardy based upon *Kennedy*-type claims are to be tried to a jury. (*Id.* at p. 360.) On October 30, 2015, West moved for a new trial based upon *Bell.* On November 9, 2015, the court granted West's motion, vacated its verdict, and set the matter for a jury trial.

1. Pre-instructions and Opening Statements

The once in jeopardy jury trial began on December 15, 2015. Before opening statements, the court instructed the jury that they were to "decide if the prosecutor in [the previous] trial . . . purposefully manipulated the presentation of evidence in that trial to force the defense to ask for a mistrial." The defense had the burden of proving its case by a preponderance of the evidence. The prosecution could, but was not required to, present evidence. The jury was "not to consider issues of [guilt]," but it was to consider the once in jeopardy allegations in light of the "charge that was originally filed against [West]," which was whether West "did willfully and unlawfully possess for sale or purchase for purposes of sale cocaine base in violation of Health and Safety Code Section 11351.5." The court explained that West was "presumed innocent in this case" and that the jury was "not to consider issues of whether or not [West] is guilty of that charged crime."

During opening statements, West's counsel informed the jury that in the underlying criminal trial the prosecutor attempted to prove West had possessed cocaine base for sale, but the defense strategy had been to convince the jury that West was only guilty of simple possession because he did not have any intent to sell.

2. Defense Evidence

The first witness was Geoffrey Carr, who had been West's defense attorney at the underlying trial. He testified that his strategy had been to persuade the jury to convict West of the lesser included offense of simple possession of cocaine, a misdemeanor. He planned to show that circumstantial evidence supported a finding that West was personally using the cocaine base.

Carr recounted some of the history of the case. He told the jeopardy jury that in the underlying trial the People had filed a motion in limine asking the court to order West

to disclose all statements from its witnesses, whether recorded or not. The court granted the motion but ordered that it apply to the People as well.

Carr said he knew that Simmont had testified at the preliminary hearing that the basis for his opinion that West possessed cocaine base for sale was the " '[t]otality of the circumstances starting with the amount. It's substantially larger than any amount you would expect to find on a user. The presence of a scale would not be necessary for personal use. Combined with the fact that I [Agent Simmont] didn't see any objective signs that [West] was under the influence of a CNS [central nervous system]' . . . 'stimulant such as cocaine base at the time while he was detained and arrested.' " Carr had not received any supplemental disclosure from the People. So, he planned to introduce Ogelsby's expert testimony to counter these three bases for Simmont's opinion.

Carr then testified that, to his surprise, Simmont offered the following bases for his opinion that were not previously disclosed to the defense: (1) West had $271, but no apparent source of income; (2) West's apartment was neat, which was inconsistent with crack use; (3) West's personal appearance was also inconsistent with crack use; and (4) drug customers sometimes use EBT cards to buy goods to exchange for drugs.[2]

Still, Carr testified, he put Ogelsby on the stand to establish reasonable doubt as to West's specific intent to sell. Ogelsby opined that 12.89 grams of cocaine base could be possessed either for sale or for personal use. Carr told the jeopardy jury that he had planned to pair that expert testimony with the circumstantial evidence jury instruction requiring "that if there are two reasonable interpretations of what that might be, the jury must adopt that that points to his innocence and reject that that points to his guilt." (See CALCRIM No. 225.)

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[2] Simmont explained that he was aware of instances in which EBT preloaded debit cards providing government assistance to recipients are used to purchase narcotics either by providing the card as currency or trading goods purchased with the EBT cards for narcotics. Photographs of West's apartment were admitted into evidence at his February 2015 trial, which showed a collection of personal items such as deodorant, soaps, and shampoos.

Carr said Ogelsby's testimony was helpful for the defense because " '[i]t was the prosecution's burden to prove to the jury that their theory of the case that he had the specific intent to sell is true beyond a reasonable doubt, not just it might be suspected or that it was probably true but beyond a reasonable doubt. So the purpose of putting on both Mr. Ogelsby and cross-examining Agent Simmont was to establish just that, that there was a doubt, which is my duty to raise a doubt if I can in the evidence and then request an acquittal on that specific mental state or specific intent."

Carr further explained that "[i]n all criminal trials, [the prosecution's burden of proof is] beyond a reasonable doubt" with regard to "each element" of the charged offense. Indeed, in a colloquy between Carr and West's jeopardy trial attorney the jury was clearly told (without objection from the People) that the burden of proof in the present jeopardy trial was "preponderance of the evidence," but in the prior criminal trial the burden was proof "beyond a reasonable doubt."

Before trial, Carr felt that West had a "fair prospect" of obtaining either an acquittal or a hung jury, and following Simmont's testimony, he felt that West's case had "taken a couple of blows" but also "felt that [he] had regrouped fairly well." He anticipated the jury would convict West of the lesser included offense of simple possession.

Even though Carr felt that the case had been going fairly well for West, he made a motion for a mistrial based upon the People's failure to provide all of the bases of Simmont's opinion because he was concerned West had been denied a fair trial. He testified that when he made the motion he said it was " 'not about [the prosecutor],' " and that at the time it was his opinion that the prosecutor's error was not intentional.

3. People's Evidence

Kimberly Perrotti was the assistant district attorney who prosecuted West in the February 2015 trial. She testified that she met with Simmont on February 16, 2015, a holiday, to prepare for his testimony. During their conversation he told her he believed West's well-dressed, well-groomed, hygienic appearance was inconsistent with his observations of cocaine base users. Simmont also said that narcotics users and sellers

sometimes conducted drug transactions using EBT cards or goods purchased with EBT cards. Perrotti did not disclose either of those points to the defense. She conceded that Simmont's testimony at trial (which surprised Carr) was consistent with their undisclosed February 16 conversation.

During the February 16 meeting, Perrotti also gave Simmont a list of areas he was prohibited from discussing at trial based upon pretrial rulings. The list of prohibited areas included evidence that a confidential informant had made a controlled buy from West. But the list did not include the undisclosed bases for Simmont's expert opinion.

Perrotti testified that at the time of West's February 2015 trial she was handling approximately 50–60 cases and that her failure to disclose to the defense the details of her discussion with Simmont was not intentional, but "[i]t was an oversight."

4. Closing Arguments

During closing arguments, West's counsel clearly explained that in the February 2015 trial the prosecution had the burden of proving beyond a reasonable doubt West's intent to sell cocaine base. More than once, counsel distinguished that burden of proof from the preponderance of the evidence standard which governed the jeopardy trial.

He observed that the purpose of the jeopardy trial was to determine whether the prosecutor had intentionally committed misconduct to provoke the defense into moving for a mistrial or whether the prosecutor intentionally and knowingly committed misconduct to thwart a likely acquittal. He argued Perrotti was worried about a possible acquittal and met with Simmont to coordinate an effort to introduce new bases for his opinion which had not been stated at the preliminary hearing.

The People argued the evidence did not show Perrotti was concerned about a possible acquittal, particularly given that both experts agreed the evidence supported a finding that West had possessed cocaine base for sale. If Perrotti's motive were to force a mistrial, the People argued, she would have elicited testimony from Simmont regarding the excluded topics she had listed for him, including that a confidential informant made a controlled buy from West.

5. Jury Instructions

The court instructed the jury with the following special once in jeopardy instruction requested by the defense:

"You must decide whether Mr. West was once in jeopardy after the February 2015 trial. That is the only purpose of this proceeding. Do not consider whether Mr. West is guilty or not guilty of any crime.

"Mr. West was once in jeopardy if you find that:

"(1) Ms. Perrotti intentionally committed misconduct that was intended to provoke the defense into moving for a mistrial;

"or,

"(2) Ms. Perrotti:

"(a) believed in view of events that unfolded during the February 2015 trial that the defense was likely to secure an acquittal on the charged offense in the absence of misconduct;

"(b) intentionally and knowingly committed misconduct;

"(c) in order to thwart such an acquittal.

"You must determine whether from an objective perspective, the prosecutor's misconduct deprived Mr. West of a reasonable prospect of an acquittal on the charged offense.

"Your verdict must be unanimous. But all of you do not need to agree on the same finding (see (1) or (2) above)."

The court instructed that it was West's burden to prove by a preponderance of the evidence that he was placed once in jeopardy. The court also gave the jury the definition of circumstantial evidence, as modified to remove references to guilt or potential conviction. (CALCRIM No. 223.)

The People had also requested CALCRIM No. 224, the standard instruction on the sufficiency of circumstantial evidence, but West's counsel objected that the instruction was "inappropriate in this context." The court agreed the instruction was not appropriate

because it "speak[s] specifically and directly on issues of guilt." It was not read to the jury.

Neither party requested, and the court did not give, CALCRIM Nos. 220 (reasonable doubt), 2302 (elements of possession for sale), 2304 (elements of possession for personal use), or an instruction defining "reasonable prospect of acquittal."

On December 17, 2015, the jury found it not true that West had been once in jeopardy.

D. March 2016 Trial on Substantive Charge

On March 9, 2016, a jury convicted West of possession of cocaine base for sale. In a bifurcated proceeding on the same day, the court found true the alleged priors. West was sentenced to three years for possession for sale of cocaine base (Health & Saf. Code, § 11351.5), plus one year for the prior prison term enhancement (Pen. Code, § 667.5, subd. (b)).

West filed a timely notice of appeal.

DISCUSSION

West seeks reversal of the once in jeopardy jury's not true finding based on alleged instructional error. He also contends there is an error in the abstract of judgment.

"It is well established that the Fifth Amendment's double jeopardy clause bars reprosecution following a defendant's acquittal. [Citation.] It follows that a criminal defendant who is in the midst of trial has an interest, stemming from the double jeopardy clause, in having his or her case resolved by the jury that was initially sworn to hear the case—and in potentially obtaining an acquittal from that jury. [Citation.] It also follows that in certain circumstances, conduct by the prosecution or the court that results in mistrial, thereby terminating the trial prior to resolution by the jury, may impair that aspect of a defendant's protected 'double jeopardy' interest. [¶] The remedy for a violation of a defendant's Fifth Amendment double jeopardy right is strong medicine—dismissal of the charges and a permanent bar to retrial. [Citation.]" (*People v. Batts* (2003) 30 Cal.4th 660, 679, fns. omitted (*Batts*).)

When a mistrial is declared over a defendant's objection, double jeopardy principles bar retrial unless the mistrial was justified by " 'manifest necessity,' " such as a hung jury. (*Batts*, *supra*, 30 Cal.4th at p. 679.) In contrast, when a mistrial is declared at a defendant's request, the general rule is that the defendant waives any double jeopardy claim and retrial is permitted. (*Id.* at pp. 679–680.) Under federal law, there is an exception to the latter general rule permitting retrial where "the prosecutor's actions giving rise to the motion for mistrial were done 'in order to goad the [defendant] into requesting a mistrial.' [Citation.]" (*Kennedy*, *supra*, 456 U.S. at p. 673.)

A broader test applies to protect double jeopardy interests guaranteed by the California Constitution. (*Batts*, *supra*, 30 Cal.4th at p. 692.) "[T]he double jeopardy clause of California Constitution article I, section 15 bars retrial following the grant of a defendant's mistrial motion (1) when the prosecution intentionally commits misconduct for the purpose of triggering a mistrial, and also (2) when the prosecution, believing in view of events that unfold during an ongoing trial that the defendant is likely to secure an acquittal at that trial in the absence of misconduct, intentionally and knowingly commits misconduct in order to thwart such an acquittal—and a court, reviewing the circumstances as of the time of the misconduct, determines that from an objective perspective, the prosecutor's misconduct in fact deprived the defendant of a reasonable prospect of an acquittal." (*Id.* at p. 695.)[3] Issues of material fact arising upon a plea of once in jeopardy based upon *Kennedy*-type claims are to be tried to a jury. (*People v. Bell*, *supra*, 241 Cal.App.4th at pp. 339–343.)

West asserts error based on the court's failure to give four instructions, one which was proposed by the People and objected to by West, and three which were not requested

[3] The special once in jeopardy instruction quoted above, which was requested by West and given by the court, is derived from *Batts*. We refer to this instruction as the *Batts* instruction.

by either side.[4] We review each alleged instructional error de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569–570.)

A. Alleged Instructional Errors

1. Reasonable Doubt Instruction

West asserts the court prejudicially erred by failing to instruct on the reasonable doubt standard (CALCRIM No. 220),[5] which he claims was necessary for the jeopardy jury to assess one of the elements of the special once in jeopardy instruction, namely, whether West had "a reasonable prospect of an acquittal" on the charged offense at the February 2015 trial. West encapsulates his argument in his reply brief: "Knowing the standard of proof (beyond a reasonable doubt) and whose burden it was (the prosecutor's) at the 2015 trial were indeed general principles of law necessary to the once-in-jeopardy jury's understanding of the case. The failure to instruct prevented the once-in-jeopardy jury from properly assessing whether appellant had 'a reasonable prospect of an acquittal' on the charged offense at the February 2015 trial."

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[4] The parties did not argue, and we do not address, whether the determination that "the prosecutorial misconduct deprived the defendant of a reasonable prospect of acquittal" involves a question of fact for the jury or of law for the court. (But see *People v. Bell*, *supra*, 241 Cal.App.4th at pp. 322, fn. 3, 360.)

[5] CALCRIM No. 220 states:

"The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial.

"A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise.

"Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

"In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

Neither West nor the People asked the court to instruct the jeopardy jury on the reasonable doubt standard. West raises the issue for the first time on appeal and argues the court had a sua sponte duty to instruct on reasonable doubt because it constitutes a legal " ' "principle[] closely and openly connected with the facts before the court, and which [is] necessary for the jury's understanding of the case." ' " (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

West argues the error was compounded by the fact that the court instructed the jeopardy jury that the defense had the burden of proof by a preponderance of the evidence, which could lead the jury to assume the prosecutor's burden at the underlying trial was also proof by a preponderance of the evidence.

West's guilt was not directly at issue at the jeopardy trial. The jury was instructed, as West requested, "You must decide whether Mr. West was once in jeopardy after the February 2015 trial. That is the only purpose of this proceeding. Do not consider whether Mr. West is guilty or not guilty of any crime." West's argument, raised for the first time on appeal, appears to be that the *Batts* instruction was too general or incomplete without the additional reasonable doubt instruction.

"Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Andrews* (1989) 49 Cal.3d 200, 218.) The record shows that the parties offered competing proposed special instructions and the court ultimately gave the *Batts* instruction proposed by West. He did not ask the court to add an explanation of the reasonable doubt standard, and therefore we find that West did not preserve this issue for appeal. (*Ibid.*)

Still, West argues that the court had a sua sponte duty to instruct the jury on the reasonable doubt standard. We disagree. Here, the issue was not whether West was guilty of the charged offense but whether West carried the burden of proving his once in jeopardy defense based upon the prior mistrial. The jeopardy jury was properly instructed of its charge under *Batts* to determine whether the prosecutor intended to cause a mistrial or committed misconduct to thwart a likely acquittal. The key issue for the jury

to determine was the intent of the prosecutor. At the jeopardy trial, the issue of West's guilt or innocence of the underlying offense was not " ' "closely and openly connected with the facts before the court," ' " or " ' "necessary for the jury's understanding of the case." ' " (*People v. Breverman*, *supra*, 19 Cal.4th at p. 154.) The court did not have a sua sponte duty to instruct on the reasonable doubt standard.

However, even if we assume the court erred in failing to give the reasonable doubt instruction, we find such error harmless. We reject West's argument that *Sullivan v. Louisiana* (1993) 508 U.S. 275 (*Sullivan*) requires automatic reversal for the failure to instruct on the reasonable doubt standard. *Sullivan* involved a first degree murder in which the trial court gave the jury an unconstitutional definition of reasonable doubt and the defendant was sentenced to death. (*Id.* at pp. 276–277.) *Sullivan* reversed, holding the instruction was not subject to a harmless error analysis because it "consist[ed] of a misdescription of the burden of proof, which vitiate[d] *all* of the jury's findings." (*Id.* at pp. 281, 282.)

We find *Sullivan* distinguishable because the issue at the jeopardy trial was not West's guilt for the charged offense; it was whether he was once in jeopardy. The failure of the court to instruct on reasonable doubt—even if error—did not "vitiate[] all of the jury's findings" and is not reversable per se. (*Sullivan*, *supra*, 508 U.S. at p. 281, italics omitted.) Instead, we find any such error to be subject to a harmless error analysis.

The People argue the harmless error analysis is governed by the standard of *People v. Watson* (1956) 46 Cal.2d 818, in which reversal is required if there is a "reasonable probabilit[y]" that absent the error in question, there would have been a more favorable outcome for the accused. (*Id.* at p. 837.) West argues the stricter standard of *Neder v. United States* (1999) 527 U.S. 1 and *People v. Wilkins* (2013) 56 Cal.4th 333 applies, in which " '[i]n deciding whether a trial court's misinstruction on an element of an offense is prejudicial to the defendant, we ask whether it appears " ' "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ' " ' [Citation.]" (*People v. Wilkins*, at p. 350.)

Even assuming, without deciding, that the stricter "beyond a reasonable doubt" harmless error standard applies to the asserted instructional omissions, we find, after reviewing the evidence and considering all relevant circumstances (*People v. Aledamat* (2019) 8 Cal.5th 1, 13), that any error was harmless beyond a reasonable doubt. It is quite clear that the court, Carr, and West's jeopardy counsel fully explained the issues and the different burdens of proof involved in the underlying case and the jeopardy trial. The jury was well informed on these matters.

The trial judge carefully explained the unusual nature of the jeopardy trial. In pre-instructions she told the jeopardy jury that its role was to decide only the issue of whether West was placed in jeopardy at the prior trial. The court generally described the issue to be decided as whether "the prosecutor [at the prior trial] . . . purposefully manipulated the presentation of evidence in that trial to force the defense to ask for a mistrial."

The court explained the defense had the burden of proof under a "more likely than not" preponderance of the evidence standard. It further informed the jury that although it was "not to consider issues of guilt in this case," West had been charged in the prior trial with "willfully and unlawfully possess[ing] for sale or purchas[ing] for purposes of sale cocaine base in violation of Health and Safety Code Section 11351.5." The court stated, "You are to at all times remember that [Mr. West] is presumed innocent in this case, that you are not to consider issues of whether or not he is guilty of that charged crime. But evidence of that and its charge and its accusation are going to be part and parcel of the evidence that you hear in this case."

The key witnesses in the jeopardy trial were the attorneys from the February trial: West's defense attorney, Geoffrey Carr, and the prosecutor, Kimberly Perrotti. Carr testified that the defense strategy was to rely on the defense expert's testimony that the amount of cocaine base at issue could be possessed either for personal use or for sale. He explained, "It was the prosecution's burden to prove to the jury that their theory of the case that [West] had the specific intent to sell is true beyond a reasonable doubt, not just it might be suspected or that it was probably true but beyond a reasonable doubt. So the purpose in putting on both Mr. Ogelsby [the defense expert] and cross-examining Agent

Simmont was to establish just that, that there was a doubt, which is my duty to raise a doubt if I can in the evidence and then request an acquittal on that specific mental state or specific intent." Carr testified the "beyond a reasonable doubt" standard applies in all criminal trials, and that it applies to each element and "elements are the pieces that we were talking about, possession and the intent. Each one of those elements has to individually be proven beyond a reasonable doubt."

During closing arguments to the jeopardy jury, West's counsel stated that unlike at the jeopardy trial, where the defense had a preponderance of the evidence burden, "the standard at the February jury trial was beyond a reasonable doubt and the burden was on the prosecution." West's jeopardy counsel further explained, "If the February jury had a reasonable doubt about the possession for sale element, then they had to acquit. They must acquit. And Geoffrey Carr at the February trial had sown the seeds of reasonable doubt through his questioning and through his expert witness." The People did not dispute this description of the burden of proof.

Under these circumstances we find that even if West had not forfeited this issue by failing to request the reasonable doubt instruction below, and even if the failure to give the reasonable doubt instruction were considered error, any possible error would be harmless. Based on the evidence and arguments presented to the jury and considering all relevant circumstances, there is no likelihood the jeopardy jury was unaware that the beyond a reasonable doubt standard applied to West's February trial.[6]

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[6] West argues that the testimony and argument made at the jeopardy trial do not correct the court's error in failing to give the reasonable doubt instruction because the jeopardy jury was instructed that it was required to follow the court's instructions. Specifically, the jeopardy jury was instructed with CALCRIM No. 200, which states, in part: "If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." We agree with the People that this admonition is limited "only to the extent those comments conflicted with the court's instructions. Because the court gave [no portions of the omitted instructions], the attorneys' comments did not conflict with any instruction. Accordingly, the jury might well have considered these comments in its deliberations." (*People v. Merritt* (2017) 2 Cal.5th 819, 831.) Here there was no conflict between West's counsel's argument that the reasonable doubt instruction applied at the February trial and the court's instructions

Therefore, we find beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. (*People v. Wilkins, supra,* 56 Cal.4th at p. 350; see *People v. Merritt, supra,* 2 Cal.5th at p. 831 [finding error harmless beyond a reasonable doubt where "[a]lthough the court did not instruct on the elements . . . , attorneys for both parties accurately described the elements [of the offense] in front of the jury"].)

2. Elements of Charged Offense

West asserts the court erred by failing to instruct the jeopardy jury on the elements of possession for sale of cocaine base (Health & Saf. Code, § 11351.5; CALCRIM No. 2302)[7] and the lesser included offense of possession of cocaine base (CALCRIM No. 2304).[8] West argues that because the charged offense at issue in the February trial

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to the jeopardy jury. It was undisputed that the reasonable doubt instruction applied to the February trial and the jeopardy jury was made aware of this fact through Carr's testimony, which was further emphasized by West's jeopardy counsel's closing argument. A reviewing court may consider counsel's statements made to the jury when determining whether an instructional failure was harmless error. (*Ibid.*)

[7] The February jury was pre-instructed with a modified version of CALCRIM No. 2302:

"The defendant is charged in Count 1 with possession for sale of cocaine base, a controlled substance, in violation of Health and Safety Code Section 11351.5. To prove that the defendant is guilty of this crime, the People must prove that:

"One, the defendant unlawfully possessed a controlled substance;

"Two, the witness [*sic*] knew of its presence;

"Three, the defendant knew of the substance's nature or character as a controlled substance;

"Four, when the defendant possessed the controlled substance, he intended to sell it;

"Five, the controlled substance was cocaine base;

"And, six, the controlled substance was in a usable amount.

" 'Selling' for the purpose of this instruction means exchanging cocaine base for money, services, or anything of value. A usable amount is a quantity that is enough to be used by someone as a controlled substance. Useless traces are not usable amounts. On the other hand, a usable amount does not have to be enough in either amount or strength to affect the user."

[8] The February jury was pre-instructed with a modified version of CALCRIM No. 2304:

was possession for sale of cocaine base, the jeopardy jury needed to be instructed on the elements to determine " 'whether from an objective perspective, the prosecutor's misconduct deprived Mr. West of a reasonable prospect of an acquittal on the charged offense.' "

Again, the jeopardy jury was not charged with determining West's guilt as to the charged offense. As with West's argument regarding the lack of a reasonable doubt instruction, he appears to be arguing that the *Batts* instruction was too general or incomplete without additional instructions on the elements of the charged offense. West did not request the court add to the *Batts* instruction by explaining the elements of the charged offense, and therefore he has forfeited this issue. (*People v. Andrews*, *supra*, 49 Cal.3d at p. 218.)

West again asserts the court had a sua sponte obligation to instruct on the elements of the underlying charged offense because the omitted instructions constituted " ' "principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." ' " (*People v. Breverman*, *supra*, 19 Cal.4th at p. 154.) We disagree. The record demonstrates that both the court and the parties explained to the jury the rather unusual nature of the jeopardy trial, at which West's guilt or innocence was not at issue, and at which the defense bore the burden of proving the prosecution's intent at the February 2015 trial by a preponderance of the

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"A lesser-included offense to Count 1 is possession of cocaine base for personal use, a violation of Health and Safety Code Section 11350. To prove that the defendant is guilty of this crime, the People must prove that:

"One, the defendant unlawfully possessed a controlled substance;

"Two, the defendant knew of its presence;

"Three, the defendant knew of the substance's nature or character as a controlled substance;

"Four, the controlled substance was cocaine base;

"And, five, the controlled substance was in a usable amount.

"A usable amount is a quantity that is enough to be used by someone as a controlled substance. Useless traces are not usable amounts. On the other hand, a useable amount does not have to be enough in either amount or strength to affect the user."

evidence. The court also explained to the jeopardy jury that the charge originally filed against West was whether he "willfully and unlawfully possess[ed] for sale or purchase[d] for purposes of sale cocaine base in violation of Health and Safety Code Section 11351.5."

Moreover, even assuming it was error for the court to fail to provide any further instruction on the underlying charged offense, any possible error was harmless. Carr testified that his strategy at the February 2015 trial was to persuade the jury to convict West of the lesser included offense of simple possession of cocaine base, and that simple possession is an element of both offenses, but possession for sale "involves a different element of mental state" and "[w]e were contesting the specific intent to sell."

Had the jeopardy trial judge given CALCRIM No. 2302 (appropriately modified as was done in the underlying trial), she would have added no relevant information to the mix. The key portion, element 4, simply describes the possession for sale element by saying, "When the defendant possessed the controlled substance, (he/she) intended (to sell it . . .)." (CALCRIM No. 2302.) The jeopardy jury had that bit of information.

Indeed, given the parties' presentations, including, among others, Carr's testimony, the description of the dueling experts' opinions about possession for sale, and West's jeopardy counsel's closing argument quoted above, we conclude that there is no likelihood the jeopardy jury was unaware of the key elements of the underlying charged offense and the lesser included offense. (*People v. Merritt*, *supra*, 2 Cal.5th at p. 831.) Accordingly, we find beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. (*People v. Wilkins*, *supra*, 56 Cal.4th at p. 350.)

3. Circumstantial Evidence (CALCRIM No. 224)

West argues the court erred by failing to give the CALCRIM No. 224 "Circumstantial Evidence: Sufficiency of Evidence" instruction.[9] According to West,

[9] CALCRIM No. 224 states:

"Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

this instruction was necessary for the jeopardy jury to assess whether West had "a reasonable prospect of acquittal" at the time of the mistrial, which is one of the elements of the *Batts* instruction. We reject West's argument.

Even assuming the failure to give CALCRIM No. 224 was error, the invited error doctrine bars West's claim. (See *People v. Cooper* (1991) 53 Cal.3d 771, 827–831 [invited error doctrine applies where the defendant objects to an instruction based on a conscious and deliberate choice].) Here, the court instructed the jury on the definition of circumstantial evidence, as modified to remove references to guilt or potential conviction. (CALCRIM No. 223.)[10] The People requested the jury also be given CALCRIM No. 224, but West objected that the instruction was "inappropriate in this context." The court agreed the instruction was not appropriate because it "speak[s] specifically and

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"Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

[10] The jury was instructed with modified CALCRIM No. 223, defining circumstantial evidence:

"Facts may be proved by direct or circumstantial evidence or by a combination of both. Direct evidence can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. Circumstantial evidence also may be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside.

"Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the legal elements in this case, including intent and mental state, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence."

directly on issues of guilt." West "may not now complain that the court did exactly what he insisted upon." (*People v. Cooper*, *supra*, 53 Cal.3d at p. 827.)

Even if the invited error doctrine did not apply and even assuming the failure to give CALCRIM No. 224 were error, any possible error is harmless under the circumstances. Carr testified that he intended to raise a reasonable doubt about West's specific intent to sell through his examination of the two experts—Ogelsby and Simmont. He explained that the underlying jury would be instructed that "[c]ircumstantial evidence has to be looked at to determine what [West's] intent might be, and that if there are two reasonable interpretations of what that might be, the jury must adopt that that points to his innocence and reject that that points to his guilt."

During closing argument at the jeopardy trial, West's jeopardy counsel summarized the state of the evidence just before the mistrial and stated, "[Y]ou heard Geoff Carr discuss with you the import of the circumstantial evidence instruction on the substantive offense, as was the case in the February trial, that if there are two reasonable explanations of a particular fact, that the jury is required to adopt that reasonable explanation that favors the defense. [¶] So the Ogelsby's testimony fits right within that, that if indeed you could say, well, it could be possessed for the purpose of sale or it could be possessed for personal use, not for sale, then that jury would have been required to adopt the favorable outcome for the defense, so that was the state of the evidence." The People did not dispute that description of the circumstantial evidence instruction.

We find the jeopardy jury was fully informed of the import of circumstantial evidence at the underlying trial and how the defense relied upon the circumstantial evidence rules to attempt to raise a reasonable doubt about West's intent to sell cocaine base. Accordingly, we find beyond a reasonable doubt that the failure to instruct the jeopardy jury with CALCRIM No. 224 did not contribute to the verdict obtained. (*People v. Wilkins*, *supra*, 56 Cal.4th at p. 350; *People v. Merritt*, *supra*, 2 Cal.5th at p. 831.)

4. Reasonable Prospect of an Acquittal

West argues the court erred by not defining "reasonable prospect of an acquittal" when it instructed the jury as part of the *Batts* instruction that "[y]ou must determine whether from an objective perspective, the prosecutor's misconduct deprived Mr. West of a reasonable prospect of an acquittal on the charged offense." Again, the court instructed the jeopardy jury with the *Batts* instruction requested by West, who never proposed that the court also define "reasonable prospect of an acquittal." We find that West forfeited this argument by failing to raise it below. (*People v. Andrews*, *supra*, 49 Cal.3d at p. 218.)

We further find the court did not have a sua sponte duty to instruct on the meaning of "reasonable prospect of an acquittal." A court does not have to define phrases that are commonly understood and do not have a technical meaning peculiar to the law. (See *People v. Estrada* (1995) 11 Cal.4th 568, 574, 578–579 [holding "reckless indifference to human life" does not have a technical meaning and that court has no sua sponte duty to give explanatory instructions in the absence of a request when the terms are commonly understood by those familiar with the English language].)

Further, the jeopardy jury heard testimony applying this language to the facts of the case. Perrotti and Agent Simmont testified at the jeopardy trial that at the conclusion of the defense case during the February 2015 trial they felt there was a high likelihood that West would be convicted of the charged offense. West's jeopardy counsel argued in closing, "[T]he instruction talks about . . . the reasonable prospect of an acquittal on the charged offense. It's not like you say, oh, well, Carr was looking for a conviction. Yeah, he sort of was, but on the misdemeanor, lesser-included offense. Whereas, what you are asked to analyze is the reasonable prospect of acquittal on the charged offense, on the possession for sale. . . . [¶] . . . [W]hen you gauge and analyze whether a reasonable prospect of acquittal occurred at [the February trial], the standard at the February jury trial was beyond a reasonable doubt and the burden was on the prosecution."

As discussed above, West's counsel then explained the reasonable doubt burden that applied at the February trial and how West's strategy was to suggest a reasonable

doubt based upon Ogelsby's expert opinion and the rules governing circumstantial evidence. He concluded his closing argument by stating that Perrotti "was trying to get around a reasonable prospect of acquittal, and she did that through a tactic of not providing and disclosing new information in the middle of a trial proceeding" and therefore West was once in jeopardy.

Even assuming it was error to fail to instruct the jury with the definition of "reasonable prospect of an acquittal" absent a request by the parties, under the circumstances of this case, any possible error was harmless. We find beyond a reasonable doubt that the failure to instruct the jeopardy jury with the definition of "reasonable prospect of an acquittal" did not contribute to the verdict obtained. (*People v. Wilkins*, *supra,* 56 Cal.4th at p. 350.)

5. No Cumulative Error

West argues that the cumulative effect of the alleged instructional errors warrants reversal. As discussed above, we do not find any individual errors. Even if we assume the court erred by failing to give the instructions that West asserts—for the first time on appeal—should have been given, any errors were harmless, individually and cumulatively.

B. Correction of Abstract of Judgment

West argues that although the abstract of judgment correctly describes West's conviction as " 'poss/cocaine for sale,' " it incorrectly designates the corresponding statute as Health and Safety Code section 11370.2, subdivision (a) (providing for an enhancement for a prior drug conviction) instead of Health and Safety Code section 11351.5 (possession of cocaine base for sale). The People concede this court should exercise its authority to correct the abstract of judgment. The reporter's transcript reflects that West was convicted of the offense charged in the information, a violation of Health and Safety Code section 11351.5. We exercise our authority to correct the clerical error in the abstract of judgment to reflect the correct corresponding statute (Health and Safety Code section 11351.5) for West's conviction of possession of cocaine base for sale. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

We remand to the trial court to correct the abstract of judgment to reflect the correct corresponding statute (Health and Safety Code section 11351.5) for West's conviction of possession of cocaine base for sale. We affirm the judgment in all other respects.

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Goode, J.*

WE CONCUR:

_____
Fujisaki, Acting P. J.

_____
Petrou, J.

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* Retired Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.